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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

Michael Katz-Lacabe and Dr. Jennifer Golbeck, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

ORACLE AMERICA, INC., a corporation organized under the laws of the State of Delaware,

Defendant.

Case No. 3-22-cv-04792-RS

DEFENDANT ORACLE AMERICA, INC.'S MOTION TO DISMISS PORTIONS OF PLAINTIFFS' SECOND AMENDED COMPLAINT

Judge: Hon. Richard Seeborg

Date: March 14, 2024
Time: 1:30 p.m.
Courtroom: 3

Date Action Filed: August 19, 2022
SAC Filed: November 17, 2023
Trial Date: Not set

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NOTICE OF MOTION AND MOTION

TO PLAINTIFFS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on March 14, 2024, at 1:30 p.m., or as soon thereafter as the matter may be heard, in Courtroom 3 located at 450 Golden Gate Avenue, 17th Floor, San Francisco, California 94102, Defendant Oracle America, Inc. will and hereby does move this Court for an order dismissing the following causes of action in Plaintiffs' Second Amended Complaint for failure to state a claim, pursuant to Federal Rules of Civil Procedure 8 and 12(b)(6):[1]

1. Intrusion Upon Seclusion Under Florida Common Law (Third Cause of Action); and
2. Violation of the Federal Wiretap Act, 18 U.S.C. §§ 2510, *et. seq.* ("ECPA") (Sixth Cause of Action).

This motion is based upon this Notice; the accompanying Memorandum of Points and Authorities; the pleadings, files, and records in this action; and such additional evidence and arguments as may be presented at the hearing of this motion.

Dated: December 22, 2023

MORRISON & FOERSTER LLP

By: */s/ Purvi G. Patel*
Purvi G. Patel

Attorneys for Defendant Oracle America, Inc.

[1] On October 3, 2023, the Court granted in part and denied in part Oracle's motion to dismiss portions of Plaintiffs' First Amended Complaint ("FAC"). (ECF No. 77.) With respect to those claims that survived Oracle's motion to dismiss, Oracle will answer 30 days after the Court rules on this motion, as stipulated and approved by the Court. (ECF No. 83.)

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STATEMENT OF THE ISSUES TO BE DECIDED

The motion raises the following issues:

1. **Intrusion Upon Seclusion Under Florida Law (Third Cause of Action)**. Whether Plaintiff Jennifer Golbeck's Florida intrusion upon seclusion claim should again be dismissed because (a) she does not plausibly allege an intrusion into a private place, whether electronic or physical, and (b) Oracle's alleged conduct does not constitute a highly offensive intrusion.
2. **Federal Wiretap Act (ECPA) (Sixth Cause of Action)**. Whether Plaintiffs' ECPA claim should, for the third time, be dismissed because Plaintiffs have not plausibly alleged that Oracle was motivated by an independent tortious purpose necessary for ECPA's "crime-tort" exception to apply.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On October 3, 2023, the Court dismissed Plaintiff Jennifer Golbeck's intrusion upon seclusion claim under Florida law and Plaintiffs' Electronic Communications Privacy Act claim. In their Second Amended Complaint ("SAC"), Plaintiffs attempt to revive these claims, but fail to cure the numerous defects identified in the Court's October 3 Order.

Plaintiffs' theory of the case remains unchanged: they allege that Oracle America, Inc. ("Oracle"), through Oracle Advertising ("OA"), purportedly violates consumers' privacy by compiling and selling "dossiers" of their personal information. This allegation is still unsupported: OA does not compile and sell "dossiers" on individuals based on their online activity. It sells access to anonymized "interest segments" of online identifiers likely to be associated with groups of people that may be interested in certain topics. Plaintiffs' own cited source undermines their characterizations; it refers to these data sets as nothing more than "sanitized" and "anonymous audience[s]" reflecting interests like "in [the] market for cars."[1] Indeed, the only purported "dossiers" Plaintiffs point to are the "Offline Access Request Response Reports" that Oracle prepares pursuant to its obligations under California law.

In repleading their previously dismissed claims, Plaintiffs put forward only implausible allegations and unreasonable inferences bearing little relationship to Oracle or the legal landscape in which it operates. Specifically, as to the Florida intrusion upon seclusion claim, Golbeck now alleges that Oracle's purported collection of her web browsing history amounts to surveillance of the protected *contents of her devices* and of *her home*. These allegations lack any basis in fact. And they are completely incongruous with her allegations that she freely communicates and transacts on the web through third party channels, eliminating any expectation of privacy under Florida law. As to their ECPA claims, Plaintiffs attempt to minimize their longstanding allegation that Oracle's purpose for the alleged interception was profit by adding allegations regarding Oracle's purported intent to "perpetuate torts on millions of Internet users" in running

[1] *See* Declaration of Purvi G. Patel ("Patel Decl.") Ex. B at 8 (web forum posts by alleged former Oracle employee commenting on Oracle's alleged data collection practices).

its ad tech business. None of their new allegations support their tort theory or lead to the inference that Oracle conducted its business with nefarious intent.

For the reasons provided herein, the Court should grant Oracle's motion, dismissing Plaintiffs' Third and Sixth causes of action without leave to amend.

II. ARGUMENT

A court must dismiss a claim under Rule 12(b)(6) if the plaintiff (1) fails to state a cognizable legal theory or (2) has not alleged sufficient facts establishing a claim to relief that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Conclusory allegations, without more, are insufficient to defeat a motion to dismiss. *See McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988). The Court must not assume the truth of legal conclusions merely because they are pleaded in the form of factual allegations. *See Iqbal*, 556 U.S. at 677-79; *Twombly*, 550 U.S. at 555 (plaintiff must plead "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do"); Fed. R. Civ. P. 8(a)(2).

The Court must dismiss Plaintiffs' Third and Sixth causes of action for the second and third time, respectively, because Plaintiffs fail to put forward plausible, fact-based allegations to support these claims. Furthermore, the Court should deny Plaintiffs leave to amend because they have "fail[ed] to cure deficiencies by amendments previously allowed." *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892 (9th Cir. 2010).

A. The Florida Intrusion Upon Seclusion Claim Again Fails Under the Court's Prior Reasoning (Third Cause of Action)

Intrusion upon seclusion under Florida law follows the Restatement's two-prong approach, requiring (1) an intrusion that (2) would be highly offensive to a reasonable person. *Hammer v. Sorensen*, 824 F. App'x 689, 695 (11th Cir. 2020). The Supreme Court of Florida, however, has construed the claim "even more narrowly"—requiring "an intrusion into a private *place* and not merely a private *activity*." *Id.* (citing *Allstate Ins. Co. v. Ginsberg*, 863 So. 2d 156, 161 n.3, 162 (Fla. 2003) (emphasis added).

In the October 3 Order, the Court dismissed the Florida intrusion upon seclusion claim,

finding that Golbeck had failed to plausibly allege an intrusion into a private place under Florida law. (ECF No. 77 at 7.) The SAC fails to cure this deficiency. Additionally, Golbeck does not plausibly allege conduct that would be highly offensive to a reasonable person. Given Golbeck's "repeated failure to cure [the] deficiencies" in pleading either element of her claim, dismissal is warranted without leave to amend. *Carvalho*, 629 F.3d at 892.

1. Golbeck still does not plausibly allege intrusion into a private place, whether electronic or physical

Under the first prong, Golbeck must plausibly allege intrusion "into a 'place' in which there is a reasonable expectation of privacy." *Spilfogel v. Fox Broad. Co.*, 433 F. App'x 724, 726 (11th Cir. 2011) (citation omitted). In the October 3 Order, the Court found that Golbeck failed to make this showing. Specifically, the Court held, "Plaintiffs do not plausibly point to any particular 'electronic space' where Plaintiff Golbeck had a reasonable expectation of privacy into which Oracle intruded. Nor do Plaintiffs plausibly aver Oracle intruded into Plaintiff Golbeck's home." (ECF No. 77 at 7.) In the SAC, Golbeck puts forward two theories of intrusion with respect to collection of her online data:[2] (1) Golbeck's devices are "password protected," and Oracle intruded into the devices by allegedly intercepting the contents of her communications and otherwise surveilling her activities on those devices (SAC ¶ 180); and (2) Oracle's alleged interception of her communications while she was in her home amounted to surveillance of the physical residence itself (*id.* ¶ 183). Both theories fail as a matter of law.

"Intrusion into Devices." Golbeck first contends that Oracle intruded into her "password protected" devices by "intercepting the contents of her communications with websites." (*Id.* ¶ 180.) But Golbeck conflates the locally saved contents of her devices' files and her browsing history. Golbeck makes no allegation that Oracle accessed any locally saved content on her "password protected" devices. And her suggestion that her browsing activity represents a "private quarter" is expressly contradicted by the Eleventh Circuit's statement of law in *Spilfogel*

[2] Golbeck's allegations with respect to the purported collection of her *offline* data in the SAC are unchanged from the FAC. (*See* FAC and SAC ¶¶ 16-17.) As such, the Court has already found them insufficient to support Golbeck's intrusion upon seclusion claim. (ECF No. 77 at 7.)

that "Florida law explicitly requires an intrusion into *a private place* and *not merely into a private activity*." 433 F. App'x at 727 (emphasis added). As the Court has already observed, "Golbeck seems to [have already] acknowledge[d] the lack of cases finding collection of browsing data constitutes an intrusion into a private quarter." (ECF No. 77 at 7 (citing ECF No. 67 at 23).)

Even if the web browsing activity on Golbeck's devices could be deemed a "place" under Florida law—and it cannot—Golbeck has no reasonable expectation of privacy as to her browsing data. Golbeck's browsing data is, by definition, shared with website operators and her internet service provider. (*See* SAC ¶ 44 (describing allegedly collected data as "communications that users have with websites").) As such, neither the domain (public website) nor the data (browsing history, click events, and metadata such as IP address) can be considered private. *See Jacome v. Spirit Airlines Inc*., No. 2021-000947-CA-01, 2021 WL 3087860, at *4 (Fla. Cir. Ct. June 17, 2021) (no expectation of privacy with respect to "mouse clicks and movements, keystrokes, search terms, information inputted by Plaintiff, and pages and content viewed by Plaintiff"); *see also United States v. Trader*, 981 F.3d 961, 967 (11th Cir. 2020), *cert. denied*, 142 S. Ct. 296 (2021) (no expectation of privacy as to email address and IP address).

"Intrusion into the Home." Golbeck next contends that Oracle's alleged interception of her data while she was at home was so pervasive that it amounted to an intrusion into the home itself. (*See* SAC ¶ 183.) Her only new allegation is that "Oracle openly touts its ability to surveil and manipulate Florida Class members within the confines of their homes." (*Id*. ¶ 182.) ***First***, this allegation is essentially identical to the allegations in the FAC that the Court previously found insufficient to state a claim. (*Compare id*. ¶ 183 (interception equivalent to a "listening device or 'bug'") *with* FAC ¶ 163 (Oracle's business practices "tantamount to erecting a camera in her home as she browses the internet").) The Court's prior ruling is clear: Golbeck did not "plausibly aver [that] Oracle intruded into [her] home." (ECF No. 77 at 7.) ***Second***, Golbeck's support for this allegation is unhelpful. She cites to OA marketing material claiming that advertisers can "target households within a radius." (SAC ¶ 64(c).) The representation means only that Oracle can identify browsing data by an internet user's IP address; it does not support a reasonable inference that Oracle conducts surveillance of individuals' activities in the home beyond their

web browsing activities.

Without any plausible allegations that Oracle intruded into a "private place," Golbeck's claim must fail. *Spilfogel*, 433 F. App'x at 726.

2. Golbeck does not allege conduct that might be considered highly offensive to a reasonable person

Independent of Florida's private place requirement, the alleged intrusion must also be "highly offensive to a reasonable person" such that it was "outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." *Oppenheim v. I.C. Sys., Inc.*, 695 F. Supp. 2d 1303, 1309-10 (M.D. Fla.), *aff'd*, 627 F.3d 833 (11th Cir. 2010) (citation omitted). Golbeck fails to allege anything new that could possibly clear this high hurdle. (*See* SAC ¶¶ 47, 177-181, 188 (again premising intrusion upon seclusion claim on browsing the internet, online data such as URLs, website titles, and click events, and offline data such as brick-and-mortar store purchases).) Florida courts routinely deny intrusion upon seclusion and related common law privacy claims involving the collection of data *more* sensitive than what Golbeck alleges:

- **Financial information found in a credit report.** *Celestine v. Cap. One*, No. 17-20237-Civ-Scola, 2017 WL 2838185, at *4 (S.D. Fla. June 30, 2017); *see also Stasiak v. Kingswood Co–Op, Inc.*, No. 8:11-cv-1828-T-33MAP, 2012 WL 527537 (M.D. Fla. Feb. 17, 2012) (obtaining credit report without permission does not rise to the level of outrageousness required for invasion of privacy).
- **Unredacted social security number.** *See Regions Bank v. Kaplan*, No. 17-15478, 2021 WL 4852268, at *13 (11th Cir. Oct. 19, 2021) (applying same outrageousness standard to publication of private facts and dismissing claim).
- **Private medical records.** *See Post-Newsweek Stations Orlando, Inc. v. Guetzloe*, 968 So. 2d 608, 613 (Fla. Dist. Ct. App. 2007) (dismissing publication of private facts claim).
- **Attorney-client communications.** *See id.* (publication of attorney-client communications not highly offensive "merely because of their nature").

The types of information on which Golbeck bases her claim—web browsing history, credit card purchases, and select data regarding retail store visits (SAC ¶¶ 12-18)—are a far cry from the sort of intrusions that Florida courts have found highly offensive. None of the online

information allegedly collected (URLs, page visits, and interactions on a website) even approaches the sensitivity of information that courts have found outrageous. *Stasiak*, 2012 WL 527537, at *3. The Florida intrusion upon seclusion claim, therefore, must be dismissed.

B. Plaintiffs Fail to Adequately Plead that ECPA's Crime-Tort Exception Applies (Sixth Cause of Action)

To plead a violation of ECPA, Plaintiffs must show an "intentional interception of the contents [of] any wire, oral, or electronic communication through the use of a device." (SAC ¶ 232); 18 U.S.C. § 2511(1)(a). As a general matter, "the consent of one party is a complete defense to a Wiretap Act claim." *In re Yahoo Mail Litig.*, 7 F. Supp. 3d 1016, 1026 (N.D. Cal. 2014). The exception to this one-party consent rule exists only where "the primary motivation or a determining factor in [a defendant's] actions has been to injure plaintiffs tortiously." *Rodriguez v. Google LLC*, No. 20-cv-04688-RS, 2021 WL 2026726, at *6 n.8 (N.D. Cal. May 21, 2021) (citation omitted); *see also* 18 U.S.C. § 2511(2)(d) (exception applied when "communication is intercepted for the purpose of committing any criminal or tortious act"). The Court has *twice* found that this crime-tort exception "*does not apply to a case such as this*, where Defendant's 'purpose has plainly not been to perpetuate torts on millions of Internet users, but to make money.'" (ECF No. 49 at 16 (quoting *Rodriguez*, 2021 WL 2026726, at *6 n.8) (emphasis added)); ECF No. 77 at 11 (holding that Plaintiffs "have not pled sufficient facts here to show Oracle had tortious motivation").)

As with their two prior attempts, "Plaintiffs have [still] not alleged sufficient facts that Oracle intercepted data with the primary motivation or purpose of committing torts on internet users." (ECF No. 77 at 11.) Plaintiffs repeat the allegations that the Court has already considered and found lacking, and their new allegations similarly fail to show that Oracle acted with tortious intent. As before, the Court should deny Plaintiffs' attempt to apply the crime-tort exception and dismiss their ECPA claim, this time without leave to amend.

1. Plaintiffs' repeated allegations should be rejected again

Many of the allegations Plaintiffs make in purported support of their "tortious intent" theory are repeats of the FAC allegations the Court has already found insufficient to show that

Oracle acted with tortious motivation. (*Compare* SAC, Section VI(F) *with* ECF No. 77 at 11.) This alone merits dismissal. *See Keith v. City of San Diego*, No. 22-cv-1226-MMA (DEB), 2023 WL 3689611, at *2 (S.D. Cal. May 26, 2023) (dismissal appropriate where amended complaint "supplie[d] no additional facts" to cure "previously noted deficiencies"); *Yaron v. Intersect ENT, Inc.*, No. 19-cv-02647-JSW, 2012 WL 12103005, at *7 (N.D. Cal. Jan. 22, 2021) (dismissing claims where plaintiff did not "meaningfully amend[] the [previously dismissed] claims"). Regardless, these repeated allegations are no more persuasive than they were in Plaintiffs' earlier complaints.

First, Plaintiffs again point to an out-of-context quote from Oracle's CEO in 2016 made during a *public* announcement to investors and the media concerning new products and services. (SAC ¶ 122.) Talking about the power of machine learning in the ad tech space, Mr. Ellison claimed that it was possible to combine users' web-browsing history and location information to inform predictions about future purchases. (*Id.* ¶ 122 n.158.) In context, the lawful purpose of the statements and the described technologies is self-evident: Oracle intended to sell its technologies to potential customers. Moreover, the Court has already expressly considered and rejected this allegation, concluding that "[w]ithout more, Plaintiffs have not alleged sufficient facts that Oracle intercepted data with the primary motivation or purpose of committing torts on internet users." (ECF No. 77 at 11.)

Second, Plaintiffs again refer to Oracle's criticisms of certain data collection practices by Google, arguing that such criticism shows that Oracle knew its own conduct was wrongful. (*Compare* FAC ¶ 98 *with* SAC ¶ 123 (alleging that "[w]ithout a trace of irony," Oracle has argued that Google wrongfully builds "shadow profiles").) But Plaintiffs' unreasonable inference should be rejected, as Plaintiffs plainly misconstrue the document they cite. Specifically, Plaintiffs rely on a 2019 submission by Oracle Corporation to the Australian Competition and Consumer Commission advocating for a review of Google's business practices *in Australia* and *under Australian law* and for amendments to that nation's privacy laws. (*See* SAC ¶ 123 nn.159, 162.) Contrary to Plaintiffs' contention, the submission does not reflect any acknowledgement by Oracle as to its own lawful business practices. (*Id.*) Rather, the submission merely reflects

concerns that Google's misrepresentations about the extent of its data collection practices amounted to barriers to competition in light of Google's substantial market power. (Patel Decl. Ex. A at 1 ("Google, by acting in an unconstrained manner, creates barriers to competition that need to be addressed").) Simply put, the submission cannot support an inference that Oracle acted with tortious intent when carrying out its own business practices, especially since those actions are expressly contemplated and permitted by statute. (*See* SAC ¶¶ 21, 26, 39, 89, 105 (citing Cal. Civ. Code § 1798.99.80, which defines "data broker" as an entity permitted to collect and sell to third parties the personal information of consumers with whom it has no direct relationship).)

2. Plaintiffs' new allegations do not show that Oracle acted with tortious intent

Plaintiffs' new allegations also do not plausibly suggest that "Oracle was aware that its conduct of profiling Class members was tortious." (*See* SAC ¶¶ 119-21, 125-33.) Plaintiffs broadly allege that (1) Oracle purportedly identifies and sells certain, allegedly problematic, interest segments contrary to its public representations (*see id.* ¶ 127 (alcohol-based interest segments); *id.* ¶¶ 128-31 (segments based on political views)); (2) that one supposed former Oracle employee was "aware that Oracle's privacy practices [were] highly problematic" (*id.* ¶ 133); and (3) that Oracle intercepted Plaintiffs' data "for the purpose of associating [it] with preexisting profiles" (*id.* ¶ 250). None of Plaintiffs' new allegations support applying ECPA's crime-tort exception here because none show that Oracle's activities constituted legally cognizable harms, much less that Oracle *intended* to harm web users in running its business. *See Planned Parenthood Fed'n of Am., Inc. v. Newman*, 51 F.4th 1125, 1136 (9th Cir. 2022) (for crime-tort exception to apply, "[a]t the time of the recording the offender must intend to use the recording to commit a criminal or tortious act") (quoting *Caro v. Weintraub*, 618 F.3d 94, 99 (2d Cir. 2010)).

a. Oracle did not act contrary to its public representations, nor is doing so indicative of tortious intent

Plaintiffs contend that Oracle's alleged tortious purpose can be inferred from its purported

failure to disclose its sale of alcohol-based and political orientation segments to the public. (SAC ¶¶ 127-31.) But Plaintiffs fail to allege facts giving rise to a plausible inference of misrepresentation. Even if they did, such allegations would still fail to plausibly allege that Oracle intended to harm web users. As with Plaintiffs' earlier allegations, their new allegations merely support the proposition that Oracle is a for-profit business acting in its commercial interests by selling interest segments to advertisers.

Plaintiffs do not plausibly allege that Oracle misrepresented its data collection practices generally or to Plaintiffs themselves. Plaintiffs first allege that Oracle "purported to cease" alcohol-based advertising in 2019, but continued to keep the line of business open through as late as July 2022. (*Id*. ¶ 127.) Plaintiffs' only basis for this allegation is a September 2019 article in the industry publication "Ad Exchanger," which neither Plaintiff alleges they read. (*Id.*) The article reports, without citation, that Oracle would discontinue selling alcohol-based segments that fall. There is no statement in the article that Oracle itself represented to consumers that it would cease selling alcohol-based segments. Nor do Plaintiffs plausibly allege that Oracle made such a representation.

Similarly, Plaintiffs allege that Oracle has sold "'sensitive interest segments' based on political orientation" and imply that it simultaneously represented in its Privacy Policy that it did not do so. (*Id*. ¶ 128.) They point to (1) Oracle's "2019 Data Directory" (*id.* ¶ 129); (2) Oracle's 2016 "Audience Playbook" (*id.* ¶ 128 n.174); and (3) an article that "demonstrate[d] that Oracle appears to continue (or at least continued as of *May 2021*) to offer political interest advertising segments for sale" (*id.* ¶ 130 (emphasis added)). At the same time, they admit that the language in the Privacy Policy stating that "Oracle does not create any online interest segments that reflect . . . [political] orientation" was current "[a]s of the filing of this action in *August 2022*." (*Id.* ¶ 128 n.172 (emphasis added).) Plaintiffs allege no facts as to what Oracle represented with regard to segments based on political orientation in 2016, 2019, or 2021. As such, Plaintiffs' allegations do not support any reasonable inference that Oracle's practices at any point were inconsistent with its stated policies. Absent any factual support, Plaintiffs' conclusory allegation that Oracle "conceal[ed]" its sale of political interest segments should be rejected. (*Id*. ¶ 131.)

Oracle's alleged misrepresentations do not support an inference of tortious intent. Irrespective of any claimed misrepresentation, Oracle's alleged conduct in creating and selling the two purportedly sensitive segments is lawful and motivated by the company's profit incentive. As an initial matter, Plaintiffs point to no statute that makes creating or selling anonymized interest segments concerning alcohol or political views unlawful—nor can they.[3] Even the recent *proposed* bills aimed at data brokers that Plaintiffs reference would not implicate the alleged conduct on which Plaintiffs now focus. (*Id*. ¶¶ 91-93 (describing two proposed bills that would bar the export of Americans' personal data and prohibit the sale of personal data to law enforcement and intelligence agencies); *id*. ¶ 96 (describing introduced bill that would ban the sale of health and location data).) Though the conduct Plaintiffs now allege may be inconsistent with their own public policy preferences, it is not unlawful.

Further, Plaintiffs plainly allege that Oracle's intent *at the time of the alleged data collection* was to further its commercial interests, dooming their attempt to invoke ECPA's crime-tort exception with respect to the new allegations. *See Caro*, 618 F.3d at 99-100 ("If, at the moment he hits 'record,' the offender does not intend to use the recording for criminal or tortious purposes, there is no violation."). As the Court previously observed, "[t]he mere possibility [that] Oracle's data collection activities could *at some future date* be deemed tortious does not justify application of the crime-fraud exception." (ECF No. 77 at 11 n.11 (citing *In re DoubleClick Inc. Priv. Litig*., 154 F. Supp. 2d 497, 518-19 (S.D.N.Y. 2001))); *see also Cohen v. Casper Sleep Inc*., No. 17cv9325, 2018 WL 3392877, at *4 (S.D.N.Y. July 12, 2018) ("[Plaintiff] fails to demonstrate that Defendants' *primary purpose* was to commit a tort. Instead, he claims that Defendants' conduct amounted to a tort.") (emphasis added).

Plaintiffs' allegations of Oracle's commercial purpose behind the alleged interception run throughout the SAC, alleging that:

[3] On the contrary, as Plaintiffs acknowledge in the SAC, current legislative policy permits registered data brokers like Oracle to collect and sell consumer personal information to third parties. (SAC ¶¶ 21, 26, 39, 89, 105 (citing Cal. Civ. Code § 1798.99.80, defining aforementioned activities of a registered data broker).)

- Oracle "profited from disclosing users' browsing histories, internet activity, and real world activity" (SAC ¶ 268);
- "Oracle CEO Larry Ellison described in detail Oracle's plan to profit from its acquisition and use of California Class members' data" (*Id.* ¶ 275);
- Oracle "trafficked in … personal information and other personal data … for substantial profits" (*Id.* ¶ 280);
- "Oracle … monetizes [web users'] data" (*Id.* ¶ 42).

In light of Plaintiffs' allegations of Oracle's commercial purpose, Plaintiffs cannot invoke the crime-tort exception to save their ECPA claim.

b. Plaintiffs cannot show that Oracle employees acted with tortious intent

Plaintiffs implausibly allege that Oracle employees were aware "that the company's privacy practices were problematic." (*Id.* ¶ 133.) In support, they cite to a single message board comment from an "anonymous [purported] former Oracle employee" who claimed that one of Oracle's privacy tools for consumers was "purposefully never updated and knowingly inaccurate." (*Id.*) Setting aside the fact that Plaintiffs do not allege that they made any effort to verify the authenticity of this anonymous comment, the comment itself does not support Plaintiffs' position. As noted on the message board, the allegedly "inaccurate" tool is not intended to provide consumers a copy of all of the information associated with them. (Patel Decl. Ex. B at 6 (message board post cited in SAC ¶ 133 n.184).) Rather, its purpose is limited to consumer requests for a copy of interest data associated with the browser used when accessing the tool. (*See id.*) And it is not the only privacy tool Oracle makes available to consumers. For example, the commenter is silent on Oracle's separate tool for retrieving consumers' *offline* data. (SAC ¶ 4 (discussing "Offline Access Request Response Report[s]").) And the commenter does not, as Plaintiffs allege, make any representation about the efficacy of Oracle's tool to opt out of data collection altogether. Nor does the comment pertain to Oracle's privacy practices at large.

While Plaintiffs claim the comment reveals Oracle's broader knowledge that its privacy practices were "problematic," they ignore the same anonymous commenter's endorsement of

Oracle's privacy regime and practices. Responding to others' data privacy concerns, the commenter noted that such concerns "confus[ed] how [Oracle's systems] operate[]." (Patel Decl. Ex. B at 8.) Rather than trafficking "first party data" identifying individuals and their purchases, Oracle's business was focused on "sanitized huge anonymous audience [data]" noting trends associated with online identifiers (*i.e.*, "in-market for cars"). (*Id.*) Taken in context, the comments do not show that this purported employee (or any others) were "deliberately and intentionally invad[ing] Class members' privacy." (SAC ¶ 133.) Rather, they reflect Oracle's efforts to safeguard sensitive data and prevent its use for prohibited applications. This anonymous post, hardly an indictment of Oracle's practices, falls far short of supporting an inference that "[Oracle's] employees recognized that its privacy [practices] were problematic" as would be necessary to invoke the crime-tort exception. *See Brown v. Google LLC*, 525 F. Supp. 3d 1049, 1079 (N.D. Cal. 2021) (crime-tort exception applied to allegations that employees "recogniz[ed] that Google's privacy disclosures [were] a 'mess'").

c. Plaintiffs' allegation that Oracle subsequently used their data does not establish tortious intent

Finally, Plaintiffs contend that Oracle's alleged "further use" associating intercepted data with "preexisting user profiles" establishes a tortious intent. (SAC ¶ 250.) Not so. Rather, courts regularly find the crime-tort exception inapplicable where the alleged interception is for the purpose of further "enriching" preexisting internet user profiles. *See Rodriguez*, 2021 WL 2026726, at *6 n.8 (declining to apply exception where Google allegedly intercepted data from apps to save individuals' activity in their "Google Account"); *In re Google Inc. Gmail Litig.*, No. 13-MD-02430-LHK, 2014 WL 1102660, at *18 n.13 (N.D. Cal. Mar. 18, 2014) (exception inapplicable where Google allegedly intercepted metadata and further associated the data with "secret user profiles"); *Cohen*, 2018 WL 3392877, at *4 (exception inapplicable to retailer's practice of collecting, de-anonymizing, and disclosing customers' de-anonymized data to third parties); *In re Nickelodeon Consumer Priv. Litig.*, No. 12-07829, 2014 WL 3012873, at *2, 13 (D.N.J. July 2, 2014) (exception inapplicable to defendant's interception of children's online data to compile profiles of individual children); *DoubleClick Inc. Priv. Litig.*, 154 F. Supp. 2d at 515

(inapplicable to interception of online advertising data to build "detailed profiles" of internet users). That's because, again, an allegation that conduct "amounted to a tort" falls far short of an allegation that the alleged tortfeasor *intended to commit* a tort. *See Cohen*, 2018 WL 3392877, at *4; *see also Nickelodeon,* 2014 WL 3012873, at *14 ("There are no facts pleaded to indicate that the interceptions in this case were motivated by anything other than Defendants' desire to monetize Plaintiffs' internet usage[.]").

The SAC—Plaintiffs' third attempt to state a claim under ECPA—contains no allegation that Oracle intercepted Plaintiffs' data with the intent to cause harm. The claim should therefore be dismissed without leave to amend.

III. CONCLUSION

For all the reasons stated above, Oracle respectfully asks the Court to dismiss the SAC's (1) Florida intrusion upon seclusion claim (Third cause of action) and (2) ECPA claim (Sixth cause of action). Moreover, because Plaintiffs have already had ample opportunity to amend, Oracle respectfully requests dismissal without leave to amend.

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